

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHELLE CRANE)	
Claimant)	
VS.)	
)	Docket No. 204,615
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF INSURANCE FUND)	
Insurance Carrier)	

ORDER

Claimant appealed from the July 15, 1996, Award entered by Administrative Law Judge John D. Clark.

APPEARANCES

Claimant appeared by her attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board reviewed and considered the record set forth in the Award except that the date of the regular hearing is corrected to read March 19, 1996. The Appeals Board adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant should be limited to her functional impairment percentage and awarded claimant a permanent partial disability of 14.5 percent to the body as a whole. The Administrative Law Judge denied claimant a work disability finding claimant's failure to complete the vocational rehabilitation plan and secure a job

paying a comparable wage invoked the policy considerations set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Claimant appeals that finding and requests Appeals Board review of the findings and conclusions concerning the nature and extent of claimant's disability.

FINDINGS OF FACT

(1) On February 28, 1992, claimant restrained a patient. Afterwards, claimant noticed that she had lost feeling in her arms. Claimant continued to work at her regular job through June 29, 1992. During this period, claimant's problems with her hands, arms, and right shoulder got worse.

(2) Claimant received medical treatment from Dr. James E. Marvel and Dr. Anand N. Kaul. Dr. Marvel performed carpal tunnel release surgery on both upper extremities. Thereafter, claimant was referred to Dr. Robert L. Eyster for treatment.

(3) The parties did not present testimony from the treating physicians. Instead, the record contains the deposition testimony of two evaluating physicians, Dr. Ernest R. Schlachter and Dr. Robert A. Rawcliffe, Jr.

(4) Claimant was examined by Dr. Schlachter on November 6, 1995, at the request of her attorney. Dr. Schlachter is a general practice physician and is not board certified in any medical specialty. He diagnosed failed bilateral carpal tunnel surgery with persistent neuropathy of the median nerve at the wrist bilaterally. Dr. Schlachter rated claimant as having a 17 percent permanent impairment of function to the body as a whole. He recommended permanent restrictions of no repetitive pushing, pulling, twisting, or grasping motions with either arm or hand; no use of vibratory tools or working in cold environments. She should avoid repetitive lifting over 10 pounds and single lifts over 15 pounds with either arm or hand. Dr. Schlachter further opined that claimant was not able to return to her previous occupation.

(5) Dr. Rawcliffe, a board-certified orthopedic surgeon, examined claimant on February 14, 1996, at the request of respondent. Dr. Rawcliffe did not find any objective evidence of any residual carpal tunnel syndrome. Claimant had subjective complaints which seemed to include the ulnar nerve distribution as well as the median nerve bilaterally. He rated claimant's permanent impairment of function at 12 percent to the body as a whole as a result of the carpal tunnel syndrome and surgery. In addition, he recommended restrictions that claimant avoid repetitive use of her hands and avoid the use of hand tools in a repetitive manner, especially power or vibratory tools. He further recommended lifting restrictions of 15 to 20 pounds for each hand and recommended against repetitive lifting of weights over 10 pounds. She also should avoid exposure to extreme cold. In Dr. Rawcliffe's opinion, there was an element of psychogenic overlay contributing to claimant's persistent symptoms that he attributed to depression.

(6) The medical restrictions prevented claimant from returning to her previous employment and respondent was unable to accommodate the restrictions. Vocational rehabilitation was recommended and a plan was approved that included reeducation and training. Claimant was to complete an associate of arts degree in social work at Cowley County Community College. However, because of health problems unrelated to the work injury which is the subject of this claim, claimant was unable to complete her degree during the plan period. Claimant testified at regular hearing that in addition to her illnesses she also missed classes, although to a much lesser degree, due to personal reasons including moving her residence and transportation problems.

(7) A preliminary hearing was held on October 3, 1995. The vocational rehabilitation plan was extended for an additional 20 weeks for a total of 72 weeks of vocational rehabilitation and temporary total disability compensation. However, this extension was insufficient for claimant to complete her degree.

(8) At the time of the March 19, 1996, regular hearing, claimant was still experiencing pain and loss of strength in her arms, together with weakness of grip and loss of feeling in her hands. She had completed approximately 24 credit hours at the community college under the vocational rehabilitation plan and had a total of approximately 30 hours of college credit. This put her about halfway through an associate's degree. Claimant had not worked anywhere since June 29, 1992, when she took off work with respondent for surgery. Claimant was looking for work and also planned to return to school for the summer semester.

(9) Respondent presented the testimony of vocational counselor Bradley E. Ashens, M.S. Based upon the restrictions recommended by Dr. Rawcliffe, Mr. Ashens opined that claimant had lost 10 to 15 percent of her ability to perform work in the open labor market. In his opinion, claimant's loss of ability to earn a comparable wage was between 28 and 30 percent based upon his opinion that her post-accident wage earning ability was between \$240 and \$260 per week. However, when comparing those wage earning ability figures to the stipulated average weekly wage, including fringe benefits, of \$425.66, the loss is between 39 and 44 percent.

(10) Mr. Ashens understood Dr. Rawcliffe's restriction against repetitive use of the hands to be on a continuous basis and, thus, did not preclude repetitive use of her hands on an occasional or frequent basis. Accordingly, Mr. Ashens assumed claimant was not precluded from using her hands repetitively up to two-thirds of the workday. He agreed that the actual restriction by Dr. Rawcliffe read "should be restricted from repetitive use of her hands and, specifically, should avoid the use of hand tools repetitively, especially power tools or vibratory tools." (Rawcliffe Depo. Ex. 2). However, he went on to state that the restrictions against repetitive use of her hands was irrelevant as claimant would have the same 10 to 15 percent labor market loss regardless of the repetitive use restrictions and based solely upon the weight lifting restrictions. He did not state what his opinion

would be as to loss of labor market based solely upon the restriction against repetitive use of her hands.

(11) Mr. Ashens stated that the vocational rehabilitation plan had the possibility of returning claimant to 100 percent of the wage she was earning at the time of her injury. However, since the plan was not completed, he did not have an opinion as to how successful she would have been at returning to work at a comparable wage with an associate of arts degree in social work. The Vocational Assessment/Evaluation dated June 30, 1994, prepared by vocational rehabilitation counselor Crystal Ebberts, which is Exhibit 3 to the Bradley E. Ashens, M.S., deposition, called for a vocational rehabilitation plan that, in the opinion of that counselor, would enable claimant to return to work in the open labor market at a comparable wage. That plan called for the completion of an associate of arts degree in two semesters plus a summer session. Mr. Ashens testified that despite an extension of the original vocational rehabilitation plan period, claimant failed to complete her degree due to illnesses which caused or contributed to claimant's inability to complete her course work. At the end of the weeks provided for in the plan amendment, Mr. Ashens prepared a closure report on January 16, 1996, that documented his efforts at following claimant's case, claimant's failure to keep in contact with him, and claimant's withdrawal from several classes.

(12) Claimant presented the testimony of vocational expert Jerry D. Hardin. Based upon the permanent restrictions imposed by Dr. Schlachter, Mr. Hardin opined that claimant's ability to perform work in the open labor market has been reduced by 75 to 80 percent. Her ability to earn comparable wages has been reduced 44 percent based upon a post-accident ability to earn \$240 per week as compared to the average weekly wage of \$425.66.

CONCLUSIONS OF LAW

Because hers is an unscheduled injury, claimant is entitled to permanent partial disability benefits based upon K.S.A. 1991 Supp. 44-510e(a) which states:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the

average gross weekly wage that the employee was earning at the time of the injury.

The Administrative Law Judge gave equal weight to the opinions of both Dr. Rawcliffe and Dr. Schlachter to find claimant has a 14.5 percent impairment of function to the body as a whole. The Appeals Board agrees with this finding. Giving equal weight to the restrictions recommended by Dr. Rawcliffe and Dr. Schlachter, the Appeals Board finds claimant's loss of ability to obtain work in the open labor market is 45 percent. Furthermore, the Appeals Board finds claimant's loss of wage earning ability to be 43 percent.

Respondent made a significant effort and incurred considerable expense to educate and retrain claimant in order to restore her capacity to earn wages comparable to those she was earning at the time of her accident. Claimant was unable to take full advantage of this opportunity and failed to complete the vocational rehabilitation plan.

In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) the Kansas Court of Appeals found that a claimant who refused to even attempt an accommodated job which had been offered to her that was within her restrictions and paid a wage comparable to that which she was earning at the time of her accident should be precluded from receiving an award for work disability. The Court imputed the comparable wage which claimant would have earned had she accepted the employment and applied the presumption of no work disability found in K.S.A. 1991 Supp. 44-510e(a).

The Appeals Board finds claimant's conduct was not a willful or deliberate attempt to manipulate the workers compensation system or a refusal to take full advantage of vocational rehabilitation benefits that may have enabled her to return to work at or near a comparable wage. Therefore, the public policy considerations announced in Foulk do not apply to the facts in this case. Claimant's attempts to find employment have been unsuccessful. She has not worked for wages since her accident date. Therefore, since claimant has not worked for wages comparable to those she was earning at the time of her accident the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e does not apply. Furthermore, there is no basis for imputing a comparable wage to invoke that presumption. Accordingly, a work disability should be awarded as provided by statute. Following the formula approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) giving equal weight to the loss of labor market and loss of ability to earn comparable wages the Appeals Board finds claimant's work disability is 44 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated July 15, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Michelle Crane, and against the respondent, State of Kansas, and its insurance carrier, State Self Insurance Fund, for an accidental injury which occurred June 29, 1992, for 170.79 weeks of temporary total disability compensation at the rate of \$283.79 per week or \$48,468.49, followed by 244.21 weeks at the rate of \$124.87 per week or \$30,494.50, for a 44% permanent partial general bodily disability, making a total award of \$78,962.99.

As of February 10, 1998, there is due and owing claimant 170.79 weeks of temporary total disability compensation at the rate of \$283.79 per week or \$48,468.49, followed by 122.35 weeks of permanent partial compensation at the rate of \$124.87 per week in the sum of \$15,277.84 for a total of \$63,746.33, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$15,216.66 is to be paid for 121.86 weeks at the rate of \$124.87 per week, until fully paid or further order of the Director.

Claimant is entitled to an award of unauthorized medical expense not to exceed the statutory maximum of \$350. Claimant also may apply for future medical benefits upon proper application to the Director and notice to all parties.

Pursuant to K.S.A. 44-536 claimant's contract of employment with counsel is affirmed insofar as it is not in contravention to the statute.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Barber & Associates	
Transcript of preliminary hearing	\$ 82.30
Deposition Services	
Transcript of regular hearing	157.90
Bannon & Associates	
Deposition of Ernest R. Schlachter, M.D.	103.64
Deposition of Jerry D. Hardin	191.30
Court Reporting Service	
Deposition of Robert A. Rawcliffe, Jr., M.D.	133.60
Deposition of Bradley E. Ashens, M.S.	223.10

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Jeffery R. Brewer, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director